

DNR settles out of court; issues St. Johns Water Quality Certification

By Liz Anderson

An out-of-court settlement agreement between the Missouri Department of Natural Resources (DNR) and the Corps of Engineers (Corps) was signed Monday, June 9, 2003 by the DNR, and a Water Quality Certification was granted for the St. Johns Bayou-New Madrid Floodway flood control project.

The agreement and associated documents must be filed with the hearing administrator in charge of the Corps' appeal of the DNR's denial of the Water Quality Certification and that case dismissed, before it becomes

absolutely final.

But attorneys for all sides have agreed and the documents have been signed by Memphis District Engineer Jack Scherer as well as Scott Totten, DNR Director of Water Protection and Soil Conservation Division. Col. Scherer signed the papers last Friday.

It should not be necessary to conduct an eight day Clean Water Commission hearing in Jefferson City in July.

Along with the settlement document is a Memorandum of Understanding (MOU) dealing with the protection of Big Oak Tree State

Park, according to Lynn Bock, attorney for the St. Johns Levee and Drainage District.

This MOU, attached to the Water Quality Certification letter, calls for the Corps to acquire 1,800 acres of land around Big Oak Tree State Park from willing sellers, giving this top priority as part of the acquisition of more than 8,000 acres of mitigation land for the project..

The additional 6,400+ mitigation acres will be chosen by a "cross-agency team", consisting of DNR, the Missouri Department of Conservation, NRCS, the Corps, and

Fish and Wildlife Service.

The 1,800 acres, which will almost triple the size of Big Oak Tree State Park, will be reforested and serve as a buffer to the park, and will keep water in the park from impacting on neighboring farmers.

The MOU also calls for the Corps to design and build a hydrology project for the park, allowing it to flood periodically at certain times of the year, to mimic natural flooding from the river in the historic past.

The DNR believes that the park has gradually dried out over time due to drainage in Mississippi County, and

putting river water in the park periodically will kill out the undesirable trees that have grown up over time in its old bottomland forest segment.

That will - eventually, DNR officials believe - lead to the regeneration of the oaks and hickories, species that have not been regenerating properly for more than a decade.

The water to be used in flooding the park will be surface water from the Mississippi River, containing sediment, another requirement from DNR.

According to Totten, the Corps has agreed to put in a pipe with a gate

under the Frontline Levee so water can flow by gravity into the park. The gate can be closed to stop the inflow into the park.

There will also be an outlet structure, allowing the water to drain into the ditch, also by gravity, to get the water off the park.

Details on just when the park will be flooded will have to be determined later by the agencies involved. DNR will have to operate those gates.

The Water Quality Certification approval also calls for the Corps to

prepare a plan to monitor jurisdictional wetlands in the immediate region for five years after the project is complete to make certain that existing wetlands retain their jurisdictional status, Bock said.

If conditions change with the flood control project in place and wetlands become degraded, the Corps will have to purchase additional mitigation acres for the project. If the Corps does not purchase additional mitigation acres if existing wetlands are degraded, the St. Johns Levee and Drainage District will have to purchase them.

If there is degradation of wetlands because of the project and no one purchases additional mitigation, the gates that will be constructed will have to remain open.

Bock said this condition probably won't impact on anything, because the Corps is 99% sure of their science and their conclusion that existing jurisdictional wetlands here won't be damaged by the project.

To Totten, the condition represents an insurance policy, so that if existing wetlands are damaged by the project, additional mitigation will be forthcoming. He added that the settlement agreement is a win-win situation, and they have issued a good Water Quality Certificate.

The condition about monitoring wetlands for five years sets a precedent on resolving agency differences in the future, he said.

There is a further condition that the Corps perform a detailed analysis of East Prairie's drainage to see if something can be done to improve it.

The settlement agreement also specifies that before construction begins on each phase of the St. Johns project, that the Corps purchase mitigation for that phase of the project.

For example, the first item for construction is construction of the

gates or gravity outlet for the pumping station in the floodway. Before a shovel of dirt is turned, mitigation for that item of construction must be purchased, Bock said.

The second item for construction is enlargement of three miles of the St. Johns Ditch.

The project is a six-year construction project.

The Corps is expected to file a motion for voluntary dismissal of the appeal before the Clean Water Commission's administrative hearing officer Tuesday or Wednesday of this week.

The hearing had been set for July 7-16 before June Striegel-Doughty, Commissioner of the Missouri Administrative Hearing Commission.

Last week, all of the entities in favor of the project that had filed as intervenors in the appeal, were asked to write a letter to DNR saying they would not sue the state to recover attorney's fees. All did.

The Corps had asked for the Water Quality Certification from DNR after the final SEIS on the project was completed last year.

DNR rejected the application in November on the grounds that agreement had not been reached on Big Oak Tree State Park, and the fact that all federal agencies had not agreed to the mitigation for the project, although EPA and U.S. Fish and Wildlife Service had signed off on the SEIS.

The Corps appealed to the Clean Water Commission in December, while also trying to negotiate a settlement.

Preparing for the hearing scheduled to begin July 7, depositions were taken from DNR officials, Corps officials, and had been scheduled for local officials. The Missouri Attorney General's office cancelled all further depositions last week, when settlement was reached.

Getting Water Quality Certification for the flood control project means the Corps can go ahead and sign the Record of Decision (R.O.D.) and go out for construction on the project.

Brig. General Don T. Riley, the Corps' Mississippi Valley Division Commander who has been nominated for his second star, is expected to sign the R.O.D. within a month, according to Project Manager Larry Sharpe, Memphis District.

The St. Johns Bayou-New Madrid Floodway flood control project is just that, a flood control project designed to stop backwater flooding in Mississippi, Scott and New Madrid counties during floods on the Lower Mississippi River.

It calls for construction of a 1,500-foot levee to "close the gap" between the Setback and Front Line Levees near New Madrid, and construction of two pumping stations, one for the St. Johns Bayou Basin and the other where gap in the levee will be closed.

The levee gap closure was authorized in 1954 and the St. Johns Bayou-New Madrid Floodway flood control project was authorized by Congress in 1986.

The tentative construction schedule calls for awarding a construction contract for the floodway gravity gates in March 2004, and then beginning on the ditch work in the summer of 2004.

Going out for construction hinges on the St. Johns Levee and Drainage District getting the necessary rights of way from landowners. The work on the ditch next summer will hinge on having the rights of way by April 2004, according to Sharpe.

Environmental Defense and the Missouri Coalition for the Environment, the latter incorporated under Illinois law, are expected to file suit against the project somewhere, sometime.